

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 MARCUS SHARIF MCNEAL,

4 Petitioner

5 v.

6 BRIAN E. WILLIAMS, et al.,

7 Respondents

Case No. 2:16-cv-01618-JAD-EJY

**Order Granting Motion to Appoint
Counsel and Motions to Amend Petition**

[ECF Nos. 55, 56, 57]

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9 *Pro se* petitioner and Nevada state prisoner Marcus Sharif McNeal brings this petition for
10 writ of habeas corpus¹ under 28 U.S.C. § 2254 to challenge his 2013 conviction for attempted
11 murder, battery with a deadly weapon, and firearm violations. McNeal moves for appointment
12 of counsel and to amend his petition.² Because I find that the procedural history of McNeal's
13 multiple habeas cases and appeals is complex, I grant the motions for appointment of counsel
14 and to amend the petition.

15 **Background**

16 McNeal initiated this habeas proceeding in July 2016 by filing a *pro se* habeas petition
17 (the "2016 petition" or "2016 case").³ He challenges a 2013 conviction and sentence imposed by
18 the Eighth Judicial District Court for Clark County, Nevada, after a trial in which the jury found
19 McNeal guilty of four counts: battery with use of a deadly weapon resulting in substantial bodily

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¹ ECF No. 6.

22 ² ECF Nos. 55–57. Respondents did not oppose these motions, and the deadline to do so expired
without a request to extend it.

23 ³ ECF No. 1.

1 harm (Count 1); attempt murder with use of a deadly weapon (Count 2); carrying concealed
2 firearm or other deadly weapon (Count 3); and possession of firearm by ex-felon (Count 5).⁴
3 McNeal was sentenced as follows: Count 1, 48–150 months; Count 2, 60–180 months to run
4 concurrent to Count 1, plus a consecutive term of 60–180 months for use of a deadly weapon;
5 Count 3, 12–36 months to run concurrent to Count 2; and Count 5, 24–60 months to run
6 consecutive to Count 3.⁵

7 In March 2017, I denied McNeal’s first motion for appointment of counsel, finding that
8 the 2016 petition presented the issues that McNeal wishes to bring sufficiently clearly, and that
9 his issues are not particularly complex.⁶ Months later, McNeal filed a second motion for
10 appointment of counsel.⁷ I denied that motion, too, finding that “McNeal failed to show that he
11 is incapable of representing himself, especially in light of the presentation of his claims in the
12 petition and the motion practice throughout this case.”⁸

13 The respondents then moved to dismiss the 2016 petition, arguing that most of McNeal’s
14 24 grounds for relief were unexhausted, while others were non-cognizable, duplicative, or
15 procedurally defaulted.⁹ I determined that many of McNeal’s claims, in whole or in part, were
16 unexhausted.¹⁰ McNeal sought permission to dismiss his unexhausted claims and proceed on his
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19 ⁴ ECF Nos. 22-31, 22-32, 23-3.

20 ⁵ ECF No. 23-3.

21 ⁶ ECF No. 5.

22 ⁷ ECF No. 18.

23 ⁸ ECF No. 29.

⁹ ECF No. 21.

¹⁰ ECF No. 38 (holding that the following claims are unexhausted in whole or in part: (1) ground 2, in part; (2) ground 4; (3) ground 5; (4) ground 6; (5) ground 7, in part; (6) ground 8, in part; (7) ground 9, in part; (8) ground 10, in part; (9) ground 11, in part; (10) ground 12, in part; (11)

1 exhausted claims, which I granted.¹¹ After full briefing, I denied his later request to supplement
2 his claims and ordered the respondents to answer the petition.¹² The respondents filed their
3 answer,¹³ and McNeal filed his reply.¹⁴

4 In addition to the 2016 petition, McNeal has filed three other federal habeas petitions in
5 this district regarding the same conviction. In October 2017, McNeal filed a second habeas
6 petition, which was dismissed as duplicative of the 2016 petition.¹⁵ He did not appeal that
7 dismissal. In January and April 2019, McNeal filed his third and fourth habeas petitions (the
8 “2019 petitions” or “2019 cases”), which were also dismissed as duplicative of the 2016
9 petition.¹⁶ McNeal appealed. Because the 2019 petitions each included a claim that was not
10 raised in the 2016 petition, the Court of Appeals for the Ninth Circuit found that the 2019
11 petitions should have been treated as motions to amend the 2016 petition.¹⁷ The Ninth Circuit
12 vacated the dismissals and remanded the 2019 cases with instructions for this Court to transfer
13 the 2019 petitions to this 2016 case and consider them as motions to amend with the benefit of
14 their original filing dates. Upon remand, McNeal renewed his motion for appointment of
15 counsel.¹⁸

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18 ground 13, in part; (12) ground 15, in part; (13) ground 16; (14) ground 17; (15) ground 18, in
19 part; (16) ground 19; (17) ground 21; and (18) ground 22).

19 ¹¹ ECF No. 45.

20 ¹² ECF No. 47.

21 ¹³ ECF No. 49.

22 ¹⁴ ECF No. 52.

23 ¹⁵ 2:17-cv-2589-RFB-CWH.

¹⁶ 2:19-cv-0151-RFB-GWF; 2:19-cv-0679-JAD-VCF.

¹⁷ See ECF No. 58.

¹⁸ ECF No. 55.

1 **Discussion**

2 There is no constitutional right to appointed counsel in a federal habeas corpus
3 proceeding.¹⁹ However, an indigent petitioner seeking relief under 28 U.S.C. § 2254 may
4 request the appointment of counsel to pursue that relief.²⁰ The court has discretion to appoint
5 counsel when the interests of justice so require.²¹ The interests of justice so require “when the
6 complexities of the case are such that denial of counsel would amount to a denial of due
7 process.”²² In the absence of such circumstances, a request for counsel in a § 2254 proceeding is
8 addressed to the sound discretion of the district court.²³

9 This once simple habeas matter has become increasingly complex. Since initiating this
10 case, (1) McNeal has filed three additional habeas petitions, (2) I found that numerous claims for
11 relief were unexhausted in whole or in part and dismissed those claims on McNeal’s request,
12 (3) the parties completed briefing on the 2016 petition, and (4) the Ninth Circuit has now
13 instructed me to consider McNeal’s 2019 petitions as motions to amend. The procedural history
14 of McNeal’s petitions for post-conviction relief in Nevada’s state and appellate courts is also
15 complex. Judicially noticeable facts indicate that McNeal has filed four state habeas petitions
16 and one is still pending on appeal, although briefing is complete.²⁴ Under these circumstances, I
17 find that appointment of counsel is in the interests of justice.

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20 ¹⁹ See *Luna v. Kernan*, 784 F.3d 640, 642 (9th Cir. 2015) (citing *Lawrence v. Florida*, 549 U.S.
327, 336–37 (2007)).

21 ²⁰ 18 U.S.C. § 3006A(a)(2)(B).

22 ²¹ *Id.*

23 ²² *Brown v. United States*, 623 F.2d 54, 61 (9th Cir. 1980).

24 ²³ *Id.* (citing *Dillon v. United States*, 307 F.2d 445, 447 (9th Cir. 1962)).

²⁴ I take judicial notice of the online docket records of the state court and appellate courts, which
may be accessed by the public online at:

1 Turning to McNeal's motions to amend his petition, I find that he should be given leave
2 to amend consistent with this Court's common practice upon the appointment of counsel in
3 habeas matters. Once counsel is confirmed, I will set a deadline for counsel to file an amended
4 petition.

5 **Conclusion**

6 IT IS THEREFORE ORDERED that:

- 7 1. Petitioner Marcus Sharif McNeal's Motion for Appointment of Counsel [ECF
8 **No. 55] is GRANTED.**
- 9 2. McNeal's Motions to Amend [ECF Nos. 56–57] **are GRANTED as described**
10 **herein.**
- 11 3. The Federal Public Defender is provisionally appointed as counsel and will have **30**
12 **days** to undertake direct representation of McNeal or to indicate the office's inability
13 to represent McNeal in these proceedings. If the Federal Public Defender is unable to
14 represent McNeal, I will appoint alternate counsel. The counsel appointed will
15 represent McNeal in all federal proceedings related to this matter, including any
16 appeals or *certiorari* proceedings, unless allowed to withdraw. A deadline for the
17 filing of an amended petition and/or seeking other relief will be set after counsel has
18 entered an appearance. I anticipate setting the deadline for approximately 90 days
19 from entry of the formal order of appointment.
- 20 4. Any deadline established and/or any extension thereof will not signify any implied
21 finding of a basis for tolling during the time period established. McNeal at all times
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<https://www.clarkcountycourts.us/Anonymous/default.aspx> and
<http://caseinfo.nvsupremecourt.us/public/caseSearch.do> (last visited Jan. 6, 2020).

1 remains responsible for calculating the running of the federal limitation period and
2 timely presenting claims. That is, by setting a deadline to amend the petition and/or
3 by granting any extension thereof, I make no finding or representation that the
4 petition, any amendments thereto, and/or any claims contained therein are not subject
5 to dismissal as untimely.²⁵

6 **The Clerk of Court is directed** to (1) SEND a copy of this order to the *pro se* petitioner,
7 the Nevada Attorney General, the Federal Public Defender, and the CJA Coordinator for this
8 division **and (2) provide the Federal Public Defender with copies** of all prior filings in this
9 case by regenerating notices of electronic filing or through such other means as is expedient for
10 the Clerk.

11 Dated: January 7, 2020

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13 U.S. District Judge Jennifer A. Dorsey
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²⁵ See *Sossa v. Diaz*, 729 F.3d 1225, 1235 (9th Cir. 2013).